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No. 05-1629

IN THE

Supreme Court of the United States

ALBERTO GONZALES, ATTORNEY GENERAL,

Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICI CURIAE* PROFESSORS OF CRIMINAL LAW IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

Amici, by their counsel, respectfully move for leave of the Court to file this brief out of time, on the ground that amici were not aware until after 3 p.m. today, November 20, 2006, that the Court had ordered briefs in this case to be filed by 3 p.m. today, which is earlier in the day than is normally required.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

This case addresses whether a violation of a California "joyriding" statute, California Vehicle Code § 10851(a), can be treated categorically as an aggravated-felony "theft offense" under the Immigration and Nationality Act ("INA"). Amici curiae are professors who teach criminal law courses at law schools in the United States, and as such they have a professional interest in ensuring that criminal law principles informing federal and state regulatory schemes like the INA are interpreted in a manner consistent with their historical evolution and their contemporary function in the criminal law. In particular, amici curiae submit this brief to highlight the importance of *mens rea* in defining offenses and the ways in which the intent requirements of the offense at issue here diverge from historical and contemporary understandings of typical theft offenses.

INTRODUCTION

This case raises the question whether the "theft offense[s]" that provide a ground for removing permanent resident aliens from the United States under 8 U.S.C. § 1101(a)(43)(G) should be read to include temporary-deprivation offenses like joyriding which, because of the absence of an intent to permanently deprive the victim of property, historically were outside the scope of paradigmatic theft crimes like larceny and embezzlement. It also raises the issue of whether a "theft offense" under the INA properly includes California's extension of aider-and-abettor liability,

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici, or their counsel, made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

through the so-called "natural and probable consequences" doctrine, to include offenders who are not shown to have any intent or knowledge with respect to the offense of conviction.

Underlying both issues is the concept of *mens rea* that lies at the core of traditional conceptions of justice in the application of the criminal law. Indeed, this Court has recognized that *mens rea* is so fundamental to notions of criminal responsibility that it is "universal and persistent in mature systems of law." *Staples v. United States*, 511 U.S. 600, 605 (1994) (quoting *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

The statute at issue in this case, California Vehicle Code § 10851(a), permits conviction based on a significantly less culpable level of intent than is generally required for conviction of a theft offense. The watered-down *mens rea* requirement of § 10851(a) diverges from the norm in two significant ways: *First*, as the history, development, and modern status of theft demonstrate, the intent to *permanently* deprive the owner of his or her property is typically an essential element of larceny, embezzlement, and false pretenses, the three offenses that together largely form the modern offense of theft. In contrast, the California statute at issue in this case expressly applies "with or without intent to steal the vehicle," as it covers both theft and joyriding—a tresspass-type offense prohibiting the taking of a vehicle with the intent to *temporarily* deprive a person of its use.

Second, California permits a defendant to be convicted as an aider and abettor even when the defendant has a lower level of criminal intent than the principal and lacks knowledge that the crime is to be committed. This rule, based on the disfavored "natural and probable consequences" doctrine of aiding and abetting liability, makes it possible for defendants to be convicted as aiders and abettors under

§ 10851(a) even without proof of the *mens rea* normally required for theft offenses.

BACKGROUND

Luis Alexander Duenas-Alvarez, a permanent resident alien, was convicted under California Vehicle Code § 10851(a), which proscribes "driv[ing] or tak[ing] a vehicle . . . without the consent of the owner . . . and with intent either to permanently or temporarily deprive the owner . . . of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle." The crime, under California law, could be considered either a felony or a misdemeanor, depending upon the punishment meted out by the sentencing judge. Cal. Penal Code § 17. The maximum punishment for the offense itself is "imprisonment in a county jail for not more than one year or in the state prison" in addition to a fine of up to $5,000. Cal. Veh. Code § 10851(a). Because of a recidivism provision, however, Duenas-Alvarez was sentenced to three years' imprisonment. *See* Cal. Penal Code § 666.5.

The United States Government instituted removal proceedings against Duenas-Alvarez under the INA, alleging that Duenas-Alvarez, *inter alia*, had committed an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). Specifically, the Government alleged that Duenas-Alvarez's conviction under California Vehicle Code § 10851(a) qualifies as a "theft offense . . . for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G). Congress did not define the phrase "theft offense."

The courts of appeals, with reference to this Court's opinion in the analogous case of *Taylor v. United States*, 495 U.S. 575, 599-602 (1990), have applied a two-step analysis to determine whether a state conviction qualifies as an aggravated felony within a particular INA category. *See, e.g.*, *Soliman v. Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005); *Ye*

v. INS, 214 F.3d 1128, 1132-1133 (9th Cir. 2000). Under the first step, the "categorical" approach, if *all* conduct prohibited by the statute of conviction fits within the generic definition of a type of offense enumerated in the INA (such as a "theft offense"), the state conviction categorically qualifies as an aggravated felony. *Taylor*, 495 U.S. at 598-99. However, if the statute of conviction permits conviction for conduct *outside* that generic definition, the court moves to the second step, the "modified categorical" approach. Under this step, the court determines whether—even if the statute of conviction sweeps in conduct outside the generic definition of a particular aggravated felony—the record establishes that the defendant's actual conduct *was* within the generic definition. *Id.* at 599-602.[2]

The immigration judge and Board of Immigration Appeals in this case concluded that Duenas-Alvarez's conviction under California Vehicle Code § 10851(a) categorically qualifies as a "theft offense" under the INA—*i.e.*, that *any* conviction under § 10851(a) necessarily constitutes an aggravated felony in the form of a theft offense under the INA. Pet. App. 3a, 8a-9a. The Court of Appeals for the Ninth Circuit reversed. Pet. App. 2a. The court followed its recent decision in *Penuliar v. Ashcroft*, 395 F.3d 1037 (2005), *amended*, 435 F.3d 961 (9th Cir.), *petition for cert. filed*, 75 U.S.L.W. 3001 (June 22, 2006) (No. 05-1630), in which it held that "[a] conviction under California's vehicle theft statute is broader than the generic definition of a 'theft offense' under 8 U.S.C. § 1101(a)(43)(G)." 395 F.3d at 1044. Accordingly, the court concluded, a conviction under

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[2] Because the second step relates primarily to the specific facts of the individual case, *amici* do not address that issue.

§ 10851(a) is not categorically a "theft offense." *Id.* The court then remanded for application of the "modified categorical" step of the *Taylor* analysis.

ARGUMENT

POINT I

THEFT OFFENSES HAVE TRADITIONALLY REQUIRED PROOF OF AN INTENTION TO PERMANENTLY DEPRIVE THE VICTIM OF PROPERTY

Section 10851(a) expressly applies "with or without intent to steal," and prohibits both vehicle theft, *i.e.*, the intended permanent deprivation of a vehicle, and joyriding, *i.e.*, the intended temporary deprivation of a vehicle. In addressing whether section 10851(a) is categorically a theft offense, this Court should consider that joyriding and theft are historically *distinct* property offenses. As this Court long ago made clear, "stealing"—the core of theft offenses—requires "the intention to keep wrongfully." *Morissette v. United States*, 342 U.S. 246, 271-72 (1952) (internal quotation marks omitted). In contrast, joyriding, which does not require an intention to keep the stolen vehicle, more closely resembles a form of trespass, not theft.

A. Theft Offenses Have Traditionally Required An Intent To Permanently Deprive The Owner Of Property

1. The Traditional Property Offenses From Which Theft Derives—Larceny, Embezzlement, And False Pretenses—Required An Intent To Effect A Permanent Deprivation

The term "theft," in modern criminal statutes, broadly refers to the three principal historical property offenses: larceny, embezzlement, and false pretenses. JEROME HALL, THEFT, LAW AND SOCIETY 34-35 (2d ed. 1952); *see also*

United States v. Bridges, 175 F.3d 1062, 1071 (D.C. Cir. 1999) (District of Columbia has "created a single statute consolidating the various forms of larceny, false pretenses and embezzlement into a single offense called 'theft.'"); *People v. Davis*, 965 P.2d 1165, 1165 (Cal. 1998) ("[T]he formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses were consolidated [in California] in 1927 into the single crime of 'theft.'"); *Hawkins v. Agric. Ins. Co.*, 190 A. 858, 861-62 (R.I. 1937) (in construing insurance policy, "the word 'theft' included not only common-law larceny but also each of the crimes which were formerly the separate crimes of embezzlement and obtaining property by false pretenses").

These offenses share the requirement that the defendant have the intent to permanently deprive the property owner of his or her property.[3] *See* BLACK'S LAW DICTIONARY 1477 (6th ed. 1990) ("Theft is any of the following acts done with intent to deprive the owner permanently of the possession, use or benefit of his property: (a) Obtaining or exerting unauthorized control over property; or (b) Obtaining by deception control over property; or (c) Obtaining by threat control over property; or (d) Obtaining control over stolen property knowing the property to have been stolen by another." (citations omitted)). Intent to deprive the owner of his property for only a temporary time was insufficient at common law to support a theft conviction, and largely remains so today.

Larceny, the initial property offense, dates back to the early common law. 4 SIR WILLIAM BLACKSTONE,

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[3] This is sometimes referred to as "the intent to steal." *See Davis*, 965 P.2d at 1167-68.

COMMENTARIES *230 (1769) (examining "theft, or larceny."); SIR EDWARD COKE, THIRD INSTITUTE *107-10 (1644); SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 503-17 (1683). Since its inception, the intent to permanently deprive the owner of his property was a required element of larceny. In his section on property offenses, Blackstone defined "larceny" as "the felonious taking, and carrying away, of the personal goods of another." 4 WILLIAM BLACKSTONE, COMMENTARIES *230. He then proceeded to "examine the nature of theft, or larceny, as laid down in the foregoing definition." *Id.* Crucially, Blackstone noted that the requirement of an intent to steal—he uses the Latin phrase *animus furandi*—excludes defendants who take property for temporary use, observing that "[t]his requisite indemnifies also mere trespassers, and other petty offenders." *Id.* *232; *see also* George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 476 (1976) ("From the earliest description in Bracton to the current cases on larceny, *animus furandi* has always been an unquestioned requirement of larceny.")(footnote omitted). Larceny was considered a serious felony and was punishable by death. Model Penal Code § 223.1 cmt. 2(a), at 128-29 (Official Draft and Revised Comments 1980).

Through the centuries, theft evolved and adapted to changing circumstances, but always retained the requirement of a permanent deprivation. Thus, larceny, the oldest of the theft offenses, originally included three required elements: "(1) a 'trespassory' taking and carrying away of property; (2) from the possession of another; with (3) the intent to permanently deprive the owner of that property." JOHN KAPLAN, ET AL., CRIMINAL LAW 1039 (3d ed. 1996). Over time, the first two of these elements were significantly relaxed and eventually abandoned as elements of theft crimes.

Larceny, for example, adopted the concept of "constructive possession," which relaxed the requirement that the defendant have taken the property directly from the owner's physical presence. *See, e.g.*, *The Carrier's Case*, Y. B. Pasch. 13 Edw. IV, f. 9, pl. 5 (Star Ch. & Exch. Ch. 1473), *reprinted in* 64 Selden Society 30 (1945) (holding that a bailee who had been given physical possession of packaged goods committed larceny when he took items for himself—notwithstanding the fact that the legal owner did not, strictly speaking, have possession of the goods when they were taken); *see also Hildebrand v. People*, 56 N.Y. 394 (1874) (bartender is guilty of larceny where a man, expecting change, gave him a $50 bill to pay for a 10-cent glass of soda water, and the bartender then forcibly ejected the man from premises and kept the money); 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 19.1(a) (2d ed. 2003).

The element of trespassory taking also was relaxed to include wrongful acquisitions that were not technically trespassory. In *Rex v. Pear*, 168 Eng. Rep. 208 (Cr. Cas. Rev. 1779), for example, the court concluded larceny could be had by trick. There, a miscreant had hired a mare to travel to one town, while in fact intending to take the animal elsewhere and sell it for his own benefit. The court held this to be larceny, since the miscreant's intent in hiring the horse was "fraudulent, the parting with the property had not changed the nature of the possession." *Id.* at 209. "The judges accepted the fiction that the owner retained possession of the horse until it was sold, on the theory that the thief had custody only for a limited purpose." *Bell v. United States*, 462 U.S. 356, 359 (1983).

In the eighteenth century, Parliament enacted statutes to create the offenses of "embezzlement" and "false pretenses," to address similar types of non-possessory or non-trespassory takings. *See* 30 Geo. 2, c. 24 (1757) (obtaining property by

false pretenses); 39 Geo. 3, c. 85 (1799) (embezzlement by servants and clerks). These offenses, which further relaxed the trespassory and possessive elements of larceny, retained the requirement of an intent to permanently deprive the owner of his property. *See, e.g.*, *Conley v. State*, 64 S.W. 218, 218 (Ark. 1901) ("If the bailee only intends to use the property, and to return it (the specified property) finally to the owner, he is not guilty of embezzlement . . . ."); 3 LAFAVE, *supra* § 19.7(f)(2), at 132 ("As with the analogous theft crimes, larceny and embezzlement, one who tells intentional lies is nevertheless not guilty of false pretenses, because he lacks the intent to defraud, if . . . he intends to return the very property obtained, unconditionally and within a reasonable time, and has a substantial ability to do so."); *State v. Guthrie*, 5 S.W.2d 306, 307 (Ark. 1928) ("[A] wrongful intent to convert another's property, thereby depriving him permanently of it, is an essential ingredient of the crime of embezzlement.") (internal quotation marks omitted); *State v. Lanyon*, 76 A. 1095, 1097 (Conn. 1910) ("To constitute embezzlement under the statute, . . . the party accused must have intended to permanently deprive the persons named in each count of the moneys therein named."); *Commonwealth v. Kelley*, 68 N.E. 346, 347 (Mass. 1903) (quoting 1899 theft statute: "Stealing. – Larceny. – The criminal taking, obtaining, or converting of personal property with intent to defraud or deprive the owner permanently of the use of it; including all forms of larceny, criminal embezzlement, and obtaining by criminal false pretences.").

2. The Evolution Of Theft Offenses Led To The Intent Element Playing An Increasingly Prominent Role In Defining The Offenses

With the evolution of these offenses, the requirement of an intent to effect a permanent deprivation took on an increasingly prominent role. In the early years, because of

the requirements of trespass and physical possession, the defendant's intent in theft was rarely questioned. If, after all, the defendant, who had no right to touch the property, physically removed the property from its owner, intent typically was easy to infer. As the objective manifestations of criminality were relaxed or removed, however, intent became the primary and distinguishing factor of the theft offenses. *See, e.g.*, *People v. Olivo*, 420 N.E.2d 40, 42 (N.Y. 1981) ("As the reach of larceny expanded, the intent element of the crime became of increasing importance, while the requirement of a trespassory taking became less significant. As a result, the bar against convicting a person who had initially obtained lawful possession of property faded."); *see also* Fletcher, *supra*, 89 HARV. L. REV. at 502 ("For modern lawyers, . . . [i]ntent is the primary issue in prosecuting larceny, at least where the requisite harm has been established; the acts are subsidiary and function as one of the several means of proving intent.").

Courts, to avoid spurious inventive tales from defendants regarding their intent to return the property, adopted other objective manifestations to prove a defendant intended to permanently deprive the owner of his property. As was explained in a note to a Queen's Bench case:

> But if [the defendant] took [goods] with a view only to a temporary user, intending however to keep them for a very unreasonable time, or to use them in a reckless, wanton, or injurious manner, and then to leave it to mere chance whether the owner ever recovered them or no, and if he recovered them at all would probably recover them in a damaged or altered condition, such a taking would seem in common sense to be ample evidence of an intent wholly to deprive the owner of his property.

Regina v. Holloway, 169 Eng. Rep. 285, 288 n.2 (1848).

In *State v. Davis*, 38 N.J.L. 176 (1875), therefore, when two companions took a man's horse and carriage from the front of his residence, drove them recklessly and then abandoned them, they were held to have been properly convicted of larceny. "An abandonment to mere chance is such reckless exposure to loss that the guilty party should be held criminally responsible for an intent to lose." *Id.* at 178-79. In *State v. Smith*, 150 S.E.2d 194 (N.C. 1966), too, the defendant was properly convicted of robbery of a rifle, even though he discarded it after taking it. "When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes it with the intent to steal (*animus furandi*)." *Id.* at 200.

The fundamental requirement of an intent to permanently deprive the victim of property, however, was not relaxed. *See, e.g., State v. Ryan*, 12 Nev. 401, 403 (1877) ("[W]e do not know of a case where it has been held that there can be larceny without any intent to deprive the owner of his property."); *see also People v. Kunkin*, 507 P.2d 1392, 1396 (Cal. 1973) ("It has been settled for at least 78 years that theft by larceny requires a specific intent permanently to deprive the rightful owner of his property."); *Smith*, 150 S.E.2d at 198 ("If [one] takes another's property for the taker's immediate and temporary use with no intent permanently to deprive the owner of his property, he is not guilty of larceny."). Indeed, a defendant would be found not guilty of theft even if the property were never returned, so long as the obstacle that frustrated the intent to return was truly unexpected. *See* 3 LAFAVE, *supra* § 19.5(b), at 90.

Appellate courts regularly overturned convictions for larceny or theft on the basis that the defendant lacked the intent to permanently deprive the owner of the property. For

example, in *People v. Brown*, 38 P. 518 (Cal. 1894), the California Supreme Court reversed a conviction for the theft of a bicycle based on an erroneous jury instruction in which "[t]he [trial] court told the jury that larceny may be committed, even though it was only the intent of the party taking the property to deprive the owner of it temporarily." *Id.* at 519. The court rejected that definition of larceny, holding that that "the authorities form an unbroken line to the effect that the felonious intent must be to deprive the owner of the property permanently. . . . [I]t must in all cases be an intent to wholly and permanently deprive the owner thereof." *Id.*

The same reasoning has been applied where the property taken was an automobile. In *Impson v. State*, 58 P.2d 523 (Ariz. 1936), the defendant's conviction was reversed because the trial court failed to instruct the jury that it must find the defendant intended to permanently deprive the owner of the automobile. The court held that "[i]t is well settled that the taking of property temporarily and with the intention of returning it is not larceny." *Id.* at 524. If the defendant intended to return the truck, "he was guilty of a civil wrong against the owner. Temporary conversion or use does not constitute larceny." *Id.* at 525.

Alleged mule thieves, too, were entitled to force the prosecution to prove the element. In *Mitchell v. Territory*, 54 P. 782 (Okla. 1898), the court reversed a conviction of two men for the larceny of three mules. The men testified that they intended to keep the mules for only three days, to harass the mules' owner as part of a dispute over the use of farm land. Over objection, the trial court excluded certain testimony that supported this explanation. The Oklahoma Supreme Court ordered a new trial, holding that larceny requires "the intent to wholly deprive the owner of the property. The intent must be . . . to deprive the owner, not temporarily, but permanently, of the property." *Id.* at 784.

The court stressed, "A taking of personal property with the intent to deprive the owner temporarily of his property, and return the same to him, is not larceny, but is trespass; is not felony, but a misdemeanor." *Id.*; *see also In re Mutchler*, 40 P. 283 (Kan. 1895) (defendant not guilty of larceny where he took someone else's horse and buggy, drove to a town 15 miles away, then wrote a letter to a friend asking him to inform the owner of the property's location).

Even where a court was moved to question the requirement of an intent to effect a permanent deprivation, it ultimately upheld the distinction as a bedrock legal principle. In 1859, the New Jersey Supreme Court, for example, struggled "to assign a satisfactory reason why the fraudulent taking of property from the owner, and an intention on the part of the taker to use the thing taken as his own, and so wrongfully to assert an entire dominion over the thing for a time, should not constitute larceny." *State v. South*, 28 N.J.L. 28, 31 (1859). The court, nonetheless, rejected the idea that the intent to temporarily deprive the owner of his property could constitute larceny, holding "the law is well settled otherwise. It has been uniformly understood and acted upon in this state." *Id.*

The element of the intent to permanently deprive has survived largely unscathed into modern criminal codes. Most states, exemplified by the Model Penal Code, have codified the three original property offenses—larceny, embezzlement, and false pretenses—and other felonious takings with the intent to steal under the general heading of "theft." *See* Model Penal Code § 223.1(1) (describing consolidation of property offenses); 3 LAFAVE, *supra* § 19.8(c), at 145 ("[I]n recent years, the great majority of states (usually as a part of enacting a new criminal code) have abolished these three separate crimes in favor of a single crime, usually called 'theft.'") (collecting statutes); *see also* Theft Act of 1968, c. 60, § 1 (1) (English statute, which serves as the model for

other Commonwealth countries: "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it . . . ."). In the vast majority of the States, these modern theft statutes have maintained the required element of the intent to permanently deprive, and do not proscribe mere unauthorized use of another's property without such intent.[4]

3. California's General Theft Statute (Which Is Not At Issue In This Case) Exemplifies The Standard Requirement Of An Intent To Effect A Permanent Deprivation

California's own general theft statute provides a good example of the modern status of theft. California broadly proscribes an offense (not at issue here) labeled "theft," which includes the common-law offenses of larceny, false pretenses, and embezzlement. *See* Cal. Penal Code § 484(a).[5]

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[4] Only two states apparently allow an intended temporary deprivation to qualify as larceny. *See* Fla. Stat. § 812.014(1) (theft exists if there is an intent to "either temporarily or permanently" deprive); Ga. Code. Ann. § 16-8-1(1)(A) (defining "deprive" as "[t]o withhold property of another permanently or temporarily"). These outliers are outnumbered by the States at the other end of the spectrum that specify that "nothing short of permanent deprivation will suffice." 3 LAFAVE, *supra* § 19.5, at 88; *see, e.g.*, 720 Ill. Comp. Stat. § 5/15-3; Kan. Stat. Ann. § 21-3110; La. Rev. Stat. Ann. § 14:67; Wis. Stat. Ann. § 943.20(1)(a).

A majority of jurisdictions also require an intent to permanently deprive to support a conviction for embezzlement or false pretenses. *See, e.g.*, Haw. Rev. Stat. §§ 708-800 & -830; 720 Ill. Comp. Stat. § 5/16-1; N.H. Rev. Stat. Ann. §§ 637:2 & :3.

[5] Cal. Penal Code § 484(a) provides:

> Theft defined—Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which

And theft under California law unambiguously requires an intent to permanently deprive the owner of property. *See, e.g.*, *People v. Pillsbury*, 138 P.2d 320 (Cal. Dist. Ct. App. 1943); *People v. Turner*, 73 Cal. Rptr. 263, 265 (Dist. Ct. App. 1968) ("The intent to steal is an intent to deprive the possessor permanently. One who takes another's property for temporary use or concealment, with the intention of returning it, is liable in tort for damages but is not guilty of larceny.") (internal quotation marks omitted); *Kunkin*, 507 P.2d at 1396 ("[T]heft by larceny requires a specific intent permanently to deprive the rightful owner of his property."); *People v. Ortega*, 968 P.2d 48, 51 (Cal. 1998) ("Theft requires . . . the specific intent to permanently deprive a person of property . . . ."); *People v. Avery*, 38 P.3d 1, 1 (Cal. 2002) ("Under California law, theft requires an intent to permanently deprive another of property."). There is no question that under California law, the taking of property with the intent to deprive the owner of its use only temporarily is not considered theft; as explained below, California, like many States, created a separate trespass-derived offense to deal with these intended temporary deprivations of property.

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has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.

B. Joyriding, Which Involves Only A Temporary Deprivation, Was Traditionally Considered To Be Outside The Scope Of Theft Offenses

The increased use of the automobile in the early twentieth century created a new social problem with which the law of theft was unable to cope: the rising incidence of intended temporary deprivations involving automobiles, otherwise known as joyriding. Persons, largely teenagers, began to "borrow" automobiles for a quick "spin" and then return them to the owners. *See* Model Penal Code § 223.9 cmt. 1, at 271.

Because of the intent requirement, these joyriders—who were merely engaging in the unauthorized use of automobiles, without seeking to take the automobiles permanently—could not be prosecuted for larceny or theft. For example, in 1970, the Mississippi Supreme Court reversed a conviction for grand larceny, which required the "criminal intent wholly and permanently to deprive the owner of his property." *Slay v. State*, 241 So. 2d 362, 364 (Miss. 1970). In the court's view, the "great weight of the evidence indicates that [the defendants], having wrongfully taken the car by an act of trespass, simply intended to drive it around town on that New Year's Eve night," then in the morning, return it to the place from where they took it. *Id.* Larceny simply did not cover such offenses. *See also Saferite v. State*, 93 P.2d 762 (Okla. Crim. App. 1939) (reversing conviction for larceny of an automobile when the evidence showed that the defendant intended to return the automobile that he had taken).

The common law never adapted to the phenomenon of joyriding. Accordingly, "states . . . progressed to statutes differentiating the taking for temporary use from larceny of an automobile." HALL, *supra*, at 257. Today, "[a] large number of states have singled out the motor vehicle for special treatment, making it a crime (generally called

'joyriding,' a crime somewhat less serious than larceny) to take such a vehicle with intent to use it and return it." 3 LAFAVE, *supra* § 19.5(b), at 92 (collecting statutes in footnote); *see also* Model Penal Code § 223.9 cmt. 1, at 271 ("Nearly all states have legislation penalizing unauthorized taking, use, or operation of motor vehicles. These laws are designed to reach temporary dispossession."). Joyriding, as Professor LaFave points out, is typically a misdemeanor offense, as opposed to theft's more serious felony status. *See* HALL, *supra,* at 257 ("Taking for temporary use is made a misdemeanor.").

Because the crime of joyriding sounds in the unauthorized use of another's property, rather than the permanent deprivation of that property, it has often been classified as a form of trespass. "To take property in the absence of an intention to steal, that is, an intention to convert the same to the use of the taker and permanently to deprive the owner thereof, is not larceny, though under proper conditions it may constitute a trespass." *Ford v. Commonwealth*, 193 S.W. 1026, 1028 (Ky. 1917); *see also State v. Labbitt*, 156 P.2d 163, 165 (Mont. 1945) ("The *animus furandi*, or intent to steal, is an essential element of the crime of larceny. It is this intent which distinguishes larceny from a mere civil trespass.") (internal quotation marks omitted)); *Parr v. Loder*, 97 A.D. 218, 220 (N.Y. App. Div. 1904) ("In *Regina v. Trebilcock* [, 7 Cox Crim. Cas. 408 (1858)] Lord Campbell, C. J., says: 'If at the time of the asportation, his (the offender's) intention is to make a mere temporary use of the chattels taken, so that the dominus should again have the use of them afterwards, that is a trespass, but not a felony.'"); *Home Fire & Marine Ins. Co. v. E.V. McCollum & Co.*, 207 P.2d 1094, 1096 (Okla. 1949) ("A taking of personal property with the intent to deprive the owner temporarily of his property and to return the same to him, is not larceny, but a trespass, is not a felony, but a misdemeanor.").

Courts have carefully policed this boundary between permanent and temporary deprivations—between larceny or theft, on one hand, and joyriding, on the other. "The apparent distinction between a larceny offense and the offense of unlawful taking of a vehicle [*i.e.*, joyriding] is that the former requires an intent to permanently deprive the owner of his vehicle while the intent involved in the latter is a temporary one." *Crow v. Coiner*, 323 F. Supp. 555, 560 (N.D. W. Va. 1971) (W. Va. law) (upholding conviction for larceny where defendant abandoned vehicle seventy miles from place of taking). In *Sandoval v. People*, 490 P.2d 1298, 1299 (Colo. 1971), the court distinguished a joyriding statute, which prohibited taking of property "for the purpose of temporarily depriving the owner," from theft, which required the defendant to "knowingly intend[] to permanently deprive that person" of the property. *See also State v. Nelson*, 386 P.2d 142, 144 (Wash. 1963) (joyriding is "distinguishable from larceny" based on the "intent to permanently deprive"); *McMurphy v. State*, 358 So. 2d 1065, 1066 (Ala. Crim. App. 1978); *State v. Williams*, 588 P.2d 1201, 1202 (Wash. Ct. App. 1978) ("[J]oyriding is not a full-blown larcenous theft"—the difference is the nature of the intended deprivation, "*i.e.*, joyriding merely requires an intent to temporarily deprive"); *State v. Wall*, 157 S.E.2d 363, 365 (N.C. 1967) (joyriding is committed when "any person who drives or otherwise takes . . . a vehicle, not his own, without the consent of the owner thereof, and with the intent to temporarily deprive said owner of his possession of such vehicle, without intent to steal the same."); *Henry v. State*, 328 A.2d 293, 297 (Md. 1974) ("An element of larceny of an automobile is the intent to deprive the owner of his property permanently while as to unauthorized use the intent is to deprive the owner of his custody or use of his property temporarily without intent to steal it.") (internal quotation marks omitted).

In sum, joyriding and other crimes involving temporary deprivations of property are offenses that derive from different sources than traditional theft offenses.[6] By expressly covering the taking of a vehicle "with intent either to permanently *or temporarily* deprive the owner" of possession, "whether with or without intent to steal the vehicle," section 10851(a) goes beyond the traditional scope of theft offenses.

POINT II

CALIFORNIA'S "NATURAL AND PROBABLE CONSEQUENCES" DOCTRINE OF AIDING AND ABETTING LIABILITY SIGNIFICANTLY BROADENS THE SCOPE OF SECTION 10851(A)

The scope of section 10851(a) is also significantly affected by California's adoption of the problematic "natural and probable consequences" doctrine of aiding and abetting

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[6] The Model Penal Code and many States have included joyriding in a chapter or section called "Theft." These statutes, however, are placed in such chapters apparently out of convenience, rather than according to any strict definition. The Model Penal Code, for example, makes clear in its commentary that "Unauthorized Use of Automobiles and Other Vehicles" is not a theft offense. *See* Model Penal Code § 223.9 cmt. 1, at 271 (noting that in addition to theft, "there is still need for a non-felony sanction against the disturbing and dangerous practice of driving off a motor vehicle belonging to another"). Theft under the Code is tied to an intent to deprive, where "deprive" is defined broadly as "to withhold property of another permanently or for so extended a period of time as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it." *Id.* § 223.0(1). The Unauthorized Use offense does not include this element. *Id.* § 223.9.

liability, which permits conviction even without proof of intent or knowledge with respect to the crime of conviction.

A. California's Natural And Probable Consequences Doctrine Allows Conviction Of Aiders And Abettors Based On An Intent Standard Akin To Negligence

If there is a common thread to modern approaches to aiding and abetting liability, it is the requirement that the aider and abettor share in the principal's purpose. This shared-purpose requirement was famously expressed by Judge Learned Hand in *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938). After surveying both the common law and the origins of the Federal aiding and abetting statute, Judge Hand stressed that aiding and abetting liability requires *intent* to aid the commission of the crime, and not the mere *probability* that the crime would result from the defendant's conduct:

> It will be observed that all these definitions have nothing whatever to do with the *probability* that the forbidden result would follow upon the accessory's conduct; and that they all demand that he in some sort associate himself with the venture, that he participate in it as in something that he *wishes* to bring about, that he seek by his action to make it succeed. All the words used—even the most colorless, "abet"—carry an implication of *purposive* attitude towards it.

Id. at 402 (emphasis added). The Second Circuit held that where the defendant had sold counterfeit bills to a purchaser, who in turn had sold the counterfeit money to a third party, the defendant could not be held criminally liable for aiding and abetting the subsequent transaction, even if it was a "natural consequence of his original act." *Id.*; *see also* Grace E. Mueller, *The Mens Rea of Accomplice Liability*, 61 S. CAL. L. REV. 2169, 2176 (1988)

("The purposive attitude standard [adopted in *Peoni*] precludes simple foreseeability as a basis for liability.").

However, some jurisdictions, including California, have incorporated a negligence-like exception to the shared-purpose requirement: the so-called "natural and probable consequences" doctrine, under which an aider and abettor need not be shown to have *any* mental state concerning the commission of the offense of conviction so long as he intends to aid in *some* offense that *foreseeably results* in commission of the offense of conviction. *See People v. Prettyman*, 926 P.2d 1013, 1015 (Cal. 1996).[7] Under that rule, an aider and abettor is liable not only for the crime he intends to aid and abet (the "target crime"), "but also for any other offense (nontarget crime) committed by the confederate as a 'natural and probable consequence' of the crime originally aided and abetted." *Id.* This is true without regard to whether the defendant intended commission of the nontarget crime, and without regard to the normal intent requirements of that crime. Moreover, the standard of foreseeability is a loose one: "[T]o be reasonably foreseeable the consequence need not have been a strong probability; a *possible* consequence which *might* reasonably have been contemplated is enough." *People v. Nguyen*, 21 Cal. App. 4th 518, 535 (1993) (emphasis added).

This doctrine, as it is applied in California, thus results in criminal liability for the nontarget offense being premised on an "objective" standard that is indistinguishable from civil negligence:

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[7] *See also People v. Robinson*, 715 N.W.2d 44, 46 (Mich. 2006); *State v. Linscott*, 520 A.2d 1067, 1070 (Me. 1987).

> The issue does not turn on the defendant's subjective state of mind, but depends upon whether, under all of the circumstances presented, *a reasonable person in the defendant's position would have or should have known* that the charged offense was a *reasonably foreseeable consequence* of the act aided and abetted by the defendant.

People v. Culuko, 78 Cal. App. 4th 307, 327 (2000) (emphasis added; citations, quotation marks, and alterations omitted); *see also Prettyman*, 926 P.2d at 1020 (doctrine imposes liability "for any reasonably foreseeable offense committed as a consequence" of the target offense) (internal quotation marks omitted).

The Commentary to the Model Penal Code makes precisely this point in rejecting the doctrine, observing that "[t]o say that the aider and abettor is liable if the offense . . . is 'reasonably foreseeable' or the 'probable consequence' of another crime is to make him liable for negligence." Model Penal Code § 2.06, at 312 n.42. Likewise, Professor LaFave notes that "[t]he 'natural and probable consequences' rule of accomplice liability .... would permit liability to be predicated upon negligence even when the crime involved requires a different state of mind." 2 LAFAVE, *supra* § 13.3(b), at 362-63; *see also, e.g.*, *United States v. Greer*, 467 F.2d 1064, 1069 (7th Cir. 1972) ("To allow a jury to infer an intent to aid in the commission of one offense from the demonstrated intent to aid in another earlier offense because the later crime is a foreseeable consequence of the earlier one, is to base criminal liability only on a showing of negligence rather than criminal intent.").

This problem, moreover, is not merely theoretical. Under the California natural and probable consequences doctrine there may be circumstances where even a "trivial" target offense makes it "possible for a confederate to become liable for the commission of a very serious crime." *People v. Solis*, 20 Cal. App. 4th 264, 272 (1993). Among other things,

California courts have expressly held that the doctrine "allows an aider and abettor to be convicted of murder, without malice"—even though a murder conviction normally requires proof of malice—*Culuko*, 78 Cal. App. 4th at 322, and that sexual offenses may be "a reasonably foreseeable consequence of a robbery." *Nguyen*, 21 Cal. App. 4th at 533.

In short, the natural and probable consequences doctrine as applied in California significantly lowers the mental state necessary to convict an aider and abettor—and thereby significantly expands the scope of criminal liability.

B. The Doctrine Has Been Severely And Persuasively Criticized

Not surprisingly, the natural and probable consequences doctrine has been the subject of severe criticism for its departure from generally-applicable principles of criminal intent and its inversion of the intent requirements for principal and aiding and abetting liability. For example, the Commentary to the Model Penal Code highlights the unfairness and anomaly of a doctrine that permits conviction of an aider and abettor based on a lower standard of intent than is required for conviction of a principal, observing:

> This is both incongruous and unjust; if anything, the culpability level for the accomplice should be higher than that of the principal actor, because there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent.

Model Penal Code § 2.06, at 312 n.42.

Professor Kadish criticizes the doctrine on similar grounds, as well as on the basis of the doctrine's departure from traditional principles requiring criminal liability to be premised on criminal intent:

> It is impossible to make [the rationale underlying the natural and probable consequences doctrine] consistent with the usual requirement of intentionality. Indeed, it is inconsistent as well with the related requirement that the accomplice act with the *mens rea* required of the principal's crime. For it would seem to allow holding the accomplice for a crime of knowledge or purpose committed by the principal as long as he should have anticipated the principal's actions.

Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 351-52 (1985).

In addition to these sources of unfairness, the doctrine has the undesirable effect of resuscitating common-law distinctions that the modern aiding and abetting statutes were designed to abolish. *See, e.g., Standefer v. United States*, 447 U.S. 10, 19 (1980) (federal aiding and abetting statute designed to "'abolish[] the distinction between principals and accessories'") (quoting *Hammer v. United States*, 271 U.S. 620, 628 (1926)). As one commentator has noted:

> If the mental state for the principal is allowed to differ . . . from that for the aider and abettor or the causer, then the jury would have to first determine in each instance whether the defendant is an aider and abettor . . . or a principal, in order to know which mental state to apply. Requiring the jury to make those distinctions effectively resurrects the pre-1909 state of the law, and stands in direct contradistinction to the "no distinction" rule.

Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1365 (2002).

For these reasons, Professor LaFave is clearly correct in observing that the natural and probable consequences doctrine is not the "better view," 2 LAFAVE, *supra* § 13.3(a), at 356; that it "is inconsistent with more fundamental principles of our system of criminal law," *id.* § 13.3(b), at 362; and that its "general application . . . is unwarranted," *id.* *See also* Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 98 n.35 (1985-1986) (doctrine is "one of the most troubling and frequently criticized aspects of accomplice liability"); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 638 (1984) (observing that, under "the natural and probable consequence rule, a defendant may be held liable for an offense even though he does not satisfy the culpability requirements of the offense").

Notably, several States that once applied the doctrine have recently disavowed and overruled those decisions that adopted it. In *Sharma v. State*, 56 P.3d 868 (Nev. 2002), for example, the Supreme Court of Nevada reversed the conviction of an individual who had been convicted of attempted murder because the jury received a natural and probable consequences instruction. *Id.* at 872-73. In reaching this result, the court noted that the "natural and probable consequence" doctrine

> has been harshly criticized by most commentators as both incongruous and unjust because it imposes accomplice liability solely upon proof of foreseeability or negligence when typically a higher degree of *mens rea* is required of the principal. It permits criminal liability to be predicated upon negligence even when the crime involved requires a different state of mind. Having re-evaluated the wisdom of this doctrine, we have concluded that its general application in Nevada

> to specific intent crimes is unsound precisely for that reason: it permits conviction without proof that the accused possessed the state of mind required by the statutory definition of the crime.

Id. at 871-72 (citations, quotation marks, footnotes and alterations omitted); *see also State v. Carrasco*, 946 P.2d 1075, 1079 (N.M. 1997) (disavowing the natural and probable consequences doctrine and, instead, requiring that "an accessory must share the criminal intent of the principal").

In short, the natural and probable consequences doctrine has been widely and justifiably criticized, and this Court should give serious consideration to those criticisms—and to the expansion of criminal liability effected by the doctrine—in analyzing whether a statute that incorporates the natural and probable consequences doctrine, as California Vehicle Code § 10851(a) necessarily does, comports with the generic understanding of what constitutes a "theft offense."

CONCLUSION

Offenses like California Vehicle Code § 10851(a), which do not require the intent to permanently deprive the victim of property, historically were outside the scope of paradigmatic theft crimes like larceny and embezzlement. The proof of intent required by § 10851(a) is also lower than the norm in that the statute incorporates California's extension of aiding and abetting liability, through the natural and probable consequences doctrine, to include offenders who do not share in the criminal intent of the principal.

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